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In the

Supreme Court of the United States

October Term, 1958

No. 92

SERVICE STORAGE AND TRANSFER COMPANY, INCORPORATED,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Company, Incorporated* v. *Commonwealth of Virginia*, 199 Va. 797, 102 S. E. 2d 339 (R. 89). The opinion of the State Corporation Commission of Virginia is set forth as *State Corporation Commission* v. *Service Storage and Transfer Company, Incorporated*, and is found on page 74 of the printed record. The opinion of the Interstate Commerce Commission, which the petitioner alleges is in conflict with the views expressed in the opinion of the Supreme Court of Appeals of Virginia,

referred to above, is reported as *Service Storage and Transfer Company, Inc.—Petition for Declaratory Order*, 71 M. C. C. 304.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on March 10, 1958 (R. 88). The petition for a writ of certiorari was filed on June 9, 1958, and was granted on October 13, 1958 (R. 98). The jurisdiction of this Court was invoked under Title 28 U. S. C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Constitutional Provisions, Article I, Section 8:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Federal Constitutional Provisions, Article VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Federal Statutes

Interstate Commerce Act, Part II, Section 203(10); Title 49, U. S. C., Section 303(10):

> "The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through

another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); Title 49, U. S. C., Section 304(c):

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Virginia Statutes

Title 56, Code of Virginia, Section 278; Vol. 8, page 235:

"No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; Vol. 8, Cum. Supp.:

> "The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

QUESTIONS PRESENTED

The petitioner presents the following questions for the decision of this Court:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission."

> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of

the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution."

"(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

STATEMENT OF THE CASE

a.

Preliminary Statement

This case is an appeal from the judgment of the Supreme Court of Appeals of Virginia of March 10, 1958, affirming in part and reversing in part an order entered on February 26, 1957, by the State Corporation Commission of Virginia wherein Service Storage and Transfer Company was fined for violating the provisions of Chapter 12, Title 56 of the Code of Virginia (1950). The Interstate Commerce Commission's decision (by Division I) in *Petition for Declaratory Order — Service Storage and Transfer Company, Inc.*, was rendered on March 29, 1957, approximately one month after the decision of the State Corporation Commission of Virginia in this matter.

b.

Statement of Facts

The respondent believes that the Statement of the Case contained in the appellant's opening brief requires amplification in some respects.

Service Storage and Transfer Company, hereinafter referred to as "Service" or "Petitioner" is a common carrier,

operating pursuant to the authority of certain certificates of public convenience and necessity issued by the Interstate Commerce Commission, and uses Bluefield, West Virginia as a "gateway" to and from the Commonwealth of Virginia. On September 19, 1956, the State Corporation Commission issued a rule pursuant to the authority vested in it by Section 56-304.12 of the Code of Virginia (1950), which rule reads in part as follows:

> "It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:" (R. 2)

Thereafter, a hearing was held by the State Corporation Commission on November 29, 1956, and, on February 26, 1957, the Commission entered an order fining Service for operating as a common carrier by motor vehicle in intrastate commerce without a certificate of public convenience and necessity from the Corporation Commission in violation of Section 56-278 of the Code of Virginia. The Commission's opinion on this matter was rendered on March 21, 1957. Thereafter, Service appealed this case to the Supreme Court of Appeals of Virginia, which court held that Service was in violation of Section 56-278 of the Code in seven of the ten instances in question and, therefore, affirmed in part and reversed in part the order of the Corporation Commission, and directed the Commission to amend its order in conformity with the Court's opinion. Service was, therefore, fined a total of $3500.00 for the following seven shipments:

ORIGIN	DESTINATION
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia

It was stipulated that all of these shipments were routed through Bluefield, West Virginia (R. 22). It is manifest from the evidence contained in the record that these seven shipments were clearly intrastate in character. If they had been moved by direct routes they never would have left the boundaries of the Commonwealth. However, the shipments in question did not follow these normal, logical routes, but were carried over abnormal, circuitous and unnecessarily long routes. Moreover, the petitioner admits that there are instances when the shipment of goods between two Virginia points through Bluefield, West Virginia, does not constitute Interstate Commerce.

> "Mr. McInerny: I don't know whether Mr. Seibert has been advised of this or not, that since the issuance of the last rule, many questionable operations were terminated, and by reason of the delay involved to some of the shippers and consignees, we had to make adjustments, and some have not been able to make adjustments, to replace the carrier service afforded by respondent, and they have submitted charges to Mr. Seibert that there is nothing available for them to do and that they know there is interstate commerce through Bluefield and through Bluefield, West Virginia, and the billings are on interstate commerce billings governed by interstate tariffs, and I feel confident everything I have said is factually accurate." (R. 7)

The petitioner does not hold a certificate of public convenience and necessity from the State Corporation Commission which would permit it to move these intrastate shipments over the direct routes mentioned above. This is not the first instance that the petitioner has been fined for engaging in this type of operation. On July 9, 1956, Service was fined for engaging in a similar type of operation (R. 76). It is manifest that the petitioner employed these unnecessarily long, circuitous and abnormal routes in an attempt to evade the jurisdiction of the Commonwealth of Virginia.

OUTLINE OF ARGUMENT

Part I.

The seven shipments involved herein are intrastate in character and are subject to State regulations even though they were moved into West Virginia. Service employed long and circuitous routes in an attempt to evade State law. The petitioner's I. C. C. certificate does not authorize it to transport intrastate shipments in the manner described.

Part II.

A state regulatory agency is vested with the authority to determine whether state laws are being violated by a certified interstate motor carrier. This is true even when the carrier asserts that it is acting pursuant to the authority granted it by the Interstate Commerce Commission. When such assertion is made a state tribunal may determine whether such certificate is controlling or if it is being used as a guise by the carrier in an attempt to evade state law. Where intrastate commerce is involved, the State's authority to control is supreme. Even if this commerce is in fact interstate, the State may still control such commerce because it is essentially local in character and of vital interest to this State.

ARGUMENT

I.

The Intrastate Character of These Shipments

(a)

THE EVIDENCE SHOWS THE SEVEN SHIPMENTS TO BE INTRASTATE

The petitioner in his opening brief ignores completely the factual situation herein involved and asserts rather blithely that these shipments are interstate simply because they were transported in motor vehicles which moved through Bluefield, West Virginia. The position of the Commonwealth is that the evidence clearly shows that these shipments were intrastate in character, and that this factor is in and of itself controlling in the determination of this controversy.

The routes employed by Service in moving these shipments were unnecessarily long, abnormal and circuitous. It is, we believe, sufficient to show the facts relative to the routing employed in one of these seven instances to substantiate our statement that the shipments were intrastate in character. The record reveals that, on September 6, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck on Route 460, one mile north of Pearisburg, Virginia, and found therein a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia (R. 13). Wytheville, Virginia lies southwest of Roanoke, Virginia, and can be most easily reached by driving down Route No. 11 over reasonably flat country, some 80 miles. (See map, Exhibit No. 1, R. 99.) This particular shipment, however, was first moved to Bluefield, West Virginia, a distance of 111 miles (R. 15) from Roanoke and then back some 49 miles to Wytheville, Virginia. From this brief summation of the evidence, it is easily seen that this shipment was transported 160 miles, or some 80 miles more than

necessary had it been moved by the most direct route which lies wholly within the State. This is but one brief example of the factual matter contained in the record. An examination of the evidence pertaining to other shipments reveals that had they been moved by normal routes they would have remained within the confines of Virginia throughout their journey. All seven shipments were from Virginia origins to Virginia destinations, and in no case was it necessary that they leave the State.

The petitioner contends that he can change these intrastate shipments into interstate shipments by moving them via Bluefield, West Virginia. To support this assertion, with which we disagree, the petitioner points to the definition of interstate commerce as found in the Interstate Commerce Act, which reads as follows:

> "(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (49 U.S.C.A. § 303 (10))

It is manifest that Congress, by the above definition, did not intend to include such commerce as involved herein. Moreover, it is obvious that these operations were not bona fide operations. The Interstate Commerce Commission (Division 5) in *Slagle Contract Carrier Application*, 2 M. C. C. 127, discussed the term "bona fide," and the following language found on page 141 is applicable herein:

> "The Latin words 'bona fide' mean 'in good faith,' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit;

> real or really; actual or actually; genuine or genuinely.' As defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly, and sincerely; without deceit or fraud.' The Supreme Court in *Ware* v. *Hylton*, 3 U. S. 199, 241, defined them as follows:
>
> "Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion, or trust." (2 M. C. C. 141-2)

This definition of bona fide when applied to the facts of this case can result in only one conclusion. The fact that the shipments crossed a State line does not automatically change intrastate commerce into interstate commerce. This language from *Roundtree* v. *Terrell*, 22 F. Supp. 297, is applicable herein:

> "True it is that commerce is undoubtedly traffic plus intercourse, and the carriage of freight and passengers between two points in one state, during which route there is passage over the soil of another state, will not render that business foreign which is domestic." (22 F. Supp. 300)

Would these seven shipments, if moved by an ordinary prudent carrier not restrained by regulation, have been transported to Bluefield, West Virginia? The answer to this question is quite obviously—*No.* It is, therefore, manifest that these shipments are intrastate in character. Whether commerce is interstate or intrastate must be determined by the usual, normal movement of the freight, and not the movement of the vehicle by which it is transported. In this case the movement of the vehicle was not only abnormal and

illogical, but the routes employed were unnecessarily long and circuitous. The test which we urge this Honorable Court to adopt is the logical movement of the freight and not the operational movement of the vehicle.

(b)

THE ROUTES WERE EMPLOYED BY SERVICE AS A SUBTERFUGE TO EVADE STATE LAW

It has been heretofore demonstrated that it was unnecessary that these shipments leave this State. The question which next presents itself may be briefly stated as follows: *Why did Service engage in these peculiar operations?* It is obvious that these abnormal routes were used by the petitioner in an attempt to evade State regulation. The Corporation Commission of Virginia fined Service for engaging in this type of operation on July 9, 1956 (R. 76), and Service did not appeal that ruling. Thereafter Service continued its unusual operations and was again proceeded against by the Corporation Commission and fined. This case involves the second proceeding.

Service does not hold a certificate of public convenience and necessity from the Virginia Corporation Commission which would permit it to haul the shipments by direct routes, and the record does not indicate that this corporation has ever applied for such certificate. Without such Virginia certificate, the petitioner cannot transport the shipments involved herein which originate and terminate at Virginia points over the direct routes which lie wholly within this State. Service, therefore, moves this freight over long, circuitous routes via Bluefield, West Virginia. Having thus operated into West Virginia, Service then produces its I. C. C. certificate and states that this type of operation, although it is without reasonable basis, is in fact

interstate commerce. The petitioner further asserts that the mere crossing of the West Virginia State line will change intrastate commerce into interstate commerce, and chooses to ignore the character of the freight. The petitioner relies heavily on the case of *Western Union Telegraph Company* v. *Speight*, 254 U. S. 17, in making the above assertion. In that case it was held by your Honorable Court that the transmission of a telegram between two points in North Carolina through a point in Virginia is interstate commerce. It is important to emphasize that the evidence in that case is entirely different from that which is involved herein. The telegraph message originated at Greenville, North Carolina, and was destined to be delivered at Rosemary, North Carolina. This Court said:

> "As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Richmond was the relay point from Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the Company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. * * *." (254 U. S. 11)

The petitioner also relies on this case in stating that the question of motive or good faith is not now involved in the controversy before this Court. The Supreme Court of the United States refused to express an opinion as to the motive of the telegraph company in transmitting the message through Virginia. The Court expressed the opinion

in this case, which was a suit for damages, that the motive was not material. Several matters are important when considering the court's holding in the Telegraph case. In the first instance, it would have been impossible for the telegraph company to transmit the telegram by a direct wire between two points in North Carolina. Secondly, the long practice of the company in conducting its operations in this manner, coupled with the fact that this method was less expensive, demonstrates the logical manner in which the message was handled. Finally, this case did not involve the regulation of the telegraph company by a state or federal authority. Taking these factors into consideration, it is submitted that this case is not controlling in this controversy in so far as "the actual transaction" is concerned for which proposition it is cited in the petitioner's brief. It is, however, important to note that the Court carefully examined the evidence relative to the manner in which Western Union operated and found that the facts demonstrated that the message had been moved in the quickest way possible. This is not true in this controversy. It would have been much quicker if Service had delivered these shipments by the direct routes, which are via highways lying within this State. Western Union could not transmit the message between two North Carolina municipalities because there were no wires linking them. The company, therefore, sent the wire the best way it could. There are, however, a sufficient number of well paved, improved highways connecting Virginia origins and destinations over which Service could transport the freight in question and never leave the State. In order to do so Service would have to secure a certificate of authority from the Virginia Commission, which it has not done.

The petitioner also quotes certain language from *Roundtree* v. *Terrell*, 22 F. Supp. 297, 299, on page 21 of his

opening brief. The mode of operation of the carrier Roundtree (doing business as Ozark Motor Lines) was transporting freight from points and places in Texas to a warehouse terminal in Texarkana, Arkansas, which is located on the Arkansas-Texas border. Ozark's trucks passed through Texarkana, Texas, late at night, on their way to the warehouse located one-half mile on the Arkansas side. The next morning the freight was moved in delivery trucks to Texarkana, Texas. In holding that this was interstate commerce, the District Court for the Northern District of Texas pointed out that the mere fact that a state line was traversed by freight moving between two points in the same state will not make such commerce interstate. Moreover, it is important to point out that the Ozark Motor Line's vehicles did not follow unusual and circuitous routes in transporting this freight. Their pattern of operation was both normal and logical. We emphasize again that the facts pertaining to each particular case are the controlling factors in the decisions of the courts. There was no evidence of a subterfuge in the Roundtree case.

Service seeks to evade the jurisdiction of Virginia by the mere linking of its intrastate freight to its interstate routes by operating over excessively lengthy routes. This Court condemned the subterfuge of linking intrastate and interstate commerce as an evasive scheme in the case of *Interstate Buses Corporation* v. *Holyoke Street Railway Company*, 273 U. S. 45, 51.

The decision of a three-judge court in the case of *Intercity Coach Company* v. *Atwood*, 21 F. 2d 83, Appeal refused 278 U. S. 663, is pertinent to this inquiry. The coach company sought to enjoin certain Rhode Island officials from its proposed operation on a bus line from Providence, Rhode Island to Woonsocket via Attleboro, Massachusetts. The

Court refused to accept the plaintiff's assertion that its motive for going into Massachusetts was immaterial, and found that such motive was indeed open to inquiry. The following language from this case is pertinent:

> "The question before us, taking the evidence most favorably to the plaintiff, is whether a bus, using the highways for carrying for hire intrastate passengers escapes state highway regulations because it may also carry an occasional interstate passenger. In our opinion it does not. Still less does it do so if (as on the present record is at least probable) the interstate character of the transportation is 'a discreditable subterfuge, to which this court ought not to lend its countenance.' Brown, J., Austin v. Tennessee, 179 U. S. 343, at page 361, 21 S. Ct. 132, 139 (45 L. Ed. 224). In Kirmeyer v. Kansas, 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721, an alleged interstate transaction is referred to by the court as being 'not a bona fide commercial arrangement.' In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry." (21 F. 2d 85)

Several decisions by state courts relative to the questions of motive and abnormal operation exemplify the necessity for examining the facts of each particular case. The Superior Court of Pennsylvania, in the case of *Blackmore* v. *Public Service Commission*, 183 Atl. 115, in affirming an order of the Pennsylvania Commission which fined Blackmore $1,000 for attempting to evade State laws by moving intrastate shipments into New Jersey and back into Pennsylvania, and further ordered Blackmore to cease and desist from such operations said:

> "While freedom of commercial intercourse between the states is of such importance that the Congress is

given power to regulate it and the states cannot be permitted to interfere with it, these false movements are not interstate commerce. The mere touching of the soil of another state not made in the ordinary course of business and in the orderly and economical transaction of commerce did not constitute, as we see it, an interference with interstate commerce. In the Nevin Bus Lines Case, cited above, we endeavored to point out the fact that the state may not interfere with the ordinary and bona fide transaction of interstate commerce, and, in so doing, what would ordinarily be intrastate transportation by reason of the interlocking of routes. The difficulty with the appellants' position is that clearly there was no justification for the movement of the freight from Allentown to Hackettstown and then retracing the route within the state of New Jersey to Easton before proceeding to Philadelphia and, to a lesser degree, for the movement of freight from Scranton to Philadelphia. If, as in the Nevin Bus Lines Case, Hackettstown had been a normal junction point for the transfer of freight and the interlocking of routes, the situation would have been different." (183 Atl. 121)

The Maryland Court of Appeals held in the case of *Clark* v. *Public Service Commission of Maryland*, 120 Atl. 2d 363, that motor carrier holding an I. C. C. certificate could not use such certificate as authorization for the hauling of freight by a circuitous route from Baltimore to Annapolis, Maryland, by way of the District of Columbia. The Maryland Court refused to allow Clark to use this subterfuge to evade Maryland law. This language from the Court's opinion is important herein:

"Whether a carrier's transportation of intrastate freight over an indirect interstate route is bona fide interstate commerce or merely a subterfuge to avoid

> the Public Service Commission's jurisdiction is primarily an administrative question to be determined by the Commission. The solution of the problem depends upon the places of origin and destination and whether the routes are necessary and reasonable. * * *." (120 Atl. 2d 368)

In an earlier controversy the Superior Court of Pennsylvania in the case of *Atlantic Freight Lines* v. *Pennsylvania Public Utility Commission*, 60 Atl. 2d 589, Cer. denied 336 U. S. 925, reached a similar conclusion. The Pennsylvania Superior Court held that the carrier's movement of freight into the Maryland Free State was a subterfuge to avoid State regulation. This decision took into consideration the fact that Atlantic had an I. C. C. certificate which Atlantic asserted permitted it to engage in such abnormal operations.

This language from *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232, is also pertinent to this inquiry:

> "We think that it is obvious that the intention of Congress in conferring rights under the grandfather clause to carriers who had been engaged in bona fide interstate operations was predicated on the idea that the existence of a bona fide operations across state lines served to raise a presumption that such operations aided convenience and were therefore a public necessity. Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state." (31 F. Supp. 236)

The reasoning set forth in the opinion of this Court in the case of *Eichholz* v. *Public Service Commission*, 306 U. S. 268, is controlling herein:

> "Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. ed. 333, 23 S. Ct. 214; Western U. Teleg. Co. v. Speight, 254 U. S. 17, 65 L. ed. 104, 41 S. Ct. 11; Missouri P. R. Co. v. Stroud, 267 U. S. 404, 69 L. ed. 683, 45 S. Ct. 243. That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. Cooley v. Port Wardens, 12 How. 299, 319, 13 L. ed. 996, 1004; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6. S. Ct. 114; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; Kelly v. Washington, 302 U. S. 1, 9, 10, 82 L. ed. 3, 10, 11, 58 S. Ct. 87. If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable

intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint." (306 U. S. 274)

In applying the above reasoning in the *Eastern Carrier* case, *supra*, the Court said:

> "The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase 'bona fide operation' employed in the grandfather clause of the Motor Carrier Act." (31 F. Supp. 237)

The several decisions and the language which we have quoted from them demonstrate that the mere crossing of a state line does not change the character of the commerce involved. They point to the further fact of the court's inquiry into the mode of operation of a carrier, and more particularly the reasons that such carrier crosses a state line. Courts will not permit a motor carrier to change the character of commerce by commercial arrangements which are not bona fide or permit them to employ discernible subterfuges to avoid regulation by State authorities.

We cannot place too much emphasis on the facts in this case which we have heretofore outlined. To summarize them briefly, it is important to note that the freight involved originated at Virginia points and was destined for delivery at Virginia points. There exists in the Southwestern portion of Virginia a network of improved highways over which these shipments could have been more easily transported without crossing into West Virginia. These shipments, however, were not moved over these highways, but were transported over long, circuitous routes by way of Bluefield, West Virginia. The use of these routes required

the freight to be hauled many additional miles and this, of course, required additional time. Your respondent has, therefore, clearly and concisely demonstrated that these seven shipments were clearly intrastate in character.

The petitioner does not hold a certificate of public convenience and necessity which would permit it to transport these seven shipments by the normal and logical routes. It has, therefore, sought to bring these operations within the authorization contained in its certificate from the Interstate Commerce Commission. (Whether or not such certificate authorizes these operations will be discussed in paragraph (c) of this argument).. A carrier operated by prudent businessmen, not restrained by Federal or State regulation, would not engage in the peculiar and unusual type of operations which the petitioner has heretofore conducted. Service can offer no logical explanation for its abnormal routing of this freight. The record does not indicate that Service has heretofore applied for a certificate of convenience and necessity from the Virginia Corporation Commission which would permit it to transport general commodities between these various Virginia points. Prior to the action of the Virginia Corporation Commission, now being reviewed by this Court, Service was fined for operating in an identical manner.

It is, therefore, apparent that Service has employed this mode of operation as a subterfuge to avoid Virginia's laws and regulations relative to the State's control of its own intrastate commerce. It is, indeed, virtually impossible to penetrate the minds of the officials of this carrier in order to determine their motive for engaging in this type of transportation. We must, therefore, look to all of the facts which are contained in the evidence relative to these operations. The sole result of such examination reveals that Service Storage and Transfer Company, Incorporated, has

employed these routes as a subterfuge in an attempt to avoid State regulation.

(c)

THE PETITIONER'S CERTIFICATE DOES NOT AUTHORIZE THESE OPERATIONS

An examination of petitioner's interstate commerce certificate reveals that it is authorized to transport general commodities as a motor carrier in interstate commerce as follows:

> "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of Bluefield, West Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory. Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va." (Ex. 2, R. 101)

It is the contention of the petitioner that this language authorizes it to transport these seven intrastate shipments involved herein. Your respondent will demonstrate that this contention is not only without foundation, but would adversely affect and destroy the State's orderly flow of intrastate commerce. It is not contended by the Commonwealth that, under certain circumstances, the movement of freight between two points in the same state through a second state does not constitute bona fide interstate commerce. Indeed, we direct this Court's attention to the case

of *Dorhn Transfer* v. *Hoegh*, 116 F. Supp. 177, wherein it was held that the Iowa Commerce Commission could not require the carrier to acquire a certificate in order for the carrier to transport shipments between Iowa points by way of Illinois. Dohrn held an I. C. C. certificate which authorized these interstate operations. The routes employed by Dohrn in conducting these operations were logical and normal in character. Moreover, by moving this freight in this manner it was transported fewer miles and, therefore, arrived at its destination more quickly. It is manifest that this commerce was not only bona fide interstate commerce but that Dorhn did not employ a subterfuge to avoid state regulation.

The petitioner's I. C. C. certificate clearly permits Service to transport *interstate shipments* between certain points in Virginia by way of Bluefield, West Virginia. There is nothing contained in that certificate which would authorize Service to transport intrastate shipments in the manner heretofore described. The certificate is the controlling document in determining the type of operations which Service is authorized to conduct. *United States* v. *Rock Island Motor Transit Company*, 340 U. S. 419, 445, 446. These three paragraphs of Certificate No. M.C.-30471 are pertinent to this discussion:

> "*After due investigation*, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and therefore, is entitled to receive authority from this Commission to engage in transportation in *interstate or foreign commerce* as a motor carrier; and the Commission so finding;
>
> "*It is ordered*, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience

and Necessity as evidence of authority of the holder to engage in transportation in *interstate or foreign commerce* as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be attached to the exercise of the privileges herein granted to the said carrier.

"*It is further ordered*, That the transportation service to be performed by the said carrier in *interstate or foreign commerce* shall be as specified below:" (R. 100) (Italics supplied)

This language clearly authorizes Service to engage only in interstate commerce. It contains no language which could be interpreted to permit it to engage in the mode of operation involved in this controversy. Petitioner contends that this certificate permits it to transport intrastate shipments between Virginia points so long as it moves them through Bluefield, West Virginia. A careful analysis of Certificate No. MC-30471 does not reveal any reasonable basis for this contention. Indeed, the above-quoted language indicates no such stretching of the authority contained in the certificate.

We next turn to the most recent statement of the Interstate Commerce Commission relative to the authority contained in petitioner's certificate. Service Storage and Transfer Company filed a Petition for Declaratory Order, or, in the alternative, for an order interpreting Certificate No. MC-30471, on January 14, 1958. This petition was filed after the State Corporation Commission had heard the evidence and arguments of counsel in the case, but prior to the entry of the final judgment order by the Virginia Commission. Division 1, after reviewing the factual matter which it had before it, stated:

"This Commission has found in numerous proceedings that transportation of shipments in *bona fide* of-

erations between points in the same State moving over authorized regular or irregular routes through another State or through an authorized gateway point in another State to which a carrier is authorized to transport a given shipment from a point in a particular State and from which it is authorized to transport the same shipment to a point in the same State, constitutes transportation in interstate commerce." (Italics added)

The Commission's conclusions are quite obviously correct and founded upon the assumption that the operations of which it was advised are bona fide. It would be illogical to assume that the I. C. C. would attempt to authorize shipments *mala fide*. This statement is borne out by this language from the Commission's opinion:

> *"In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce.* This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va., is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics added)

It is manifest that the Interstate Commerce Commission recognized the right of the State Corporation Commission to find that the carrier had attempted, by use of subterfuge, to evade State laws and regulations. These conclusions are

buttressed by the Commission's finding that the evidence before it showed that the routes employed by the petitioner "are not unduly circuitous and impracticable." Moreover, the Commission's opinion that the routes of which it was advised were "such as might normally be used" indicates that the Commission was cognizant of the existence of abnormal, unduly long and circuitous routes which the petitioner might use in an attempt to evade State regulation.

The opinion of Division I on its face does not authorize the petitioner to engage in the type of operations herein involved. Moreover, Division I recognized the possibility that Service might attempt to use its I. C. C. certificate in a manner which would be violative of State law. It is, therefore, manifest that Service Storage and Transfer Company, Incorporated, is not authorized by Certificate MC-30471 to transport intrastate shipments by way of Bluefield, West Virginia.

Part II.

IT IS FOR A STATE TRIBUNAL TO DETERMINE WHETHER A CERTIFIED INTERSTATE MOTOR CARRIER IS OPERAING IN VIOLATION OF STATE LAWS.

Your respondent has clearly demonstrated that this commerce, although it moved across a state line, is intrastate in character. The Commonwealth has also shown this movement to be illogical and without reason. This is sufficient to vest the State Corporation Commission of Virginia with the authority to adjudicate this controversy which has now reached this Court. The controlling factor in this case is the evidence involved herein which has heretofore been summarized and analyzed. The control of intrastate commerce is vested in the State, and Section 302(b), Title 49 U. S. C. reaffirms this principle:

> "(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Congress clearly recognized the necessity for spelling out specifically the power of the states in order that Part II of the Interstate Commerce Act might not be interpreted to divest the states of this vital function. Section 56-278 of the Code of Virginia, 1950, provides as follows:

> "No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

The State Corporation Commission is thereby vested with the authority to control the intrastate operation of common carriers by motor vehicle in Virginia. The intrastate commerce which is involved in this controversy comes within the jurisdiction of this State Commission.

The petitioner recognizes that a state may question the legality of the operations of a federally certified carrier but denies Virginia's jurisdiction in the instant controversy (Petitioner's Opening Brief, p. 28). Service asserts that,

in the instant case, the Virginia Commission was required to seek relief from I. C. C. 49 U. S. C. A. 304(c) permits the Interstate Commerce Commission to entertain such complaints by state boards, but does not require a state commission to petition for relief under the circumstances involved herein. Indeed, petitioner cites no case or federal statute which *requires* a state regulatory agency to seek relief from the Interstate Commerce Commission under this factual situation.

However, Service points to the fact that the Virginia Commission was served with a copy of Service's Petition for Declaratory Order, and did not file any pleading or enter an appearance in that proceeding. This is not denied by the Commonwealth. It is significant, however, to note the sequence of the various proceedings:

(1) June 11, 1956, State Corporation Commission issues rule alleging that Service had transported property in intrastate commerce in violation of Chapter 12, Title 56 of the Code of Virginia (1950). (Case No. 13074 — R. 76)

(2) June 28, 1956, Virginia Commission holds hearing in case No. 13074. (R. 76)

(3) July 9, 1956, Virginia Commission fines Service $25.00 in case No. 13074 for the violations alleged, and delivers opinion. (R. 75-82)

(4) July 12-13, 1956, counsel for Service and Commission exchange letters. (R. 83-85)

(5) No appeal (which is an appeal of right) is taken from Virginia Commission's decision in case No. 13074 to the Supreme Court of Appeals of Virginia.

(6) September 19, 1956, Virginia Commission issues rule alleging that Service has again transported property

in intrastate commerce in violation of Chapter 12, Title 56 of the Code of Virginia (1950). (Case No. 13182 — R. 2-4)

(7) November 29, 1956, Virginia Commission holds hearing in case No. 13182. (R. 4-72)

(8) Transcript of evidence promised counsel for Service by January 15, 1957, and Service to file brief setting forth its position within 20 days thereafter.

(9) January 14, 1957, Service Storage and Transfer Company, Incorporated, files Petition for Declaratory Order before I. C. C. (71 M. C. C. 304)

(10) February 26, 1957, Virginia Commission enters order fining Service $5,000 for ten violations of Chapter 12, Title 56 of the Code of Virginia (1950) in case No. 13182. (R. 72)

(11) March 21, 1957; Virginia Commission delivers opinion in case No. 13182. (R. 74-86)

(12) March 22, 1957, Service notes appeal to the Supreme Court of Appeals of Virginia. (R. 88)

(13) March 29, 1957, Interstate Commerce Commission issues opinion in Service Storage and Transfer Company, Incorporated — Petition for Declaratory Order. (71 M. C. C. 304)

(14) May 14, 1957, Supreme Court of Appeals of Virginia awards an appeal of right to Virginia Commission's decision in case No. 13182.

(15) March 10, 1958, Supreme Court of Appeals issues an order affirming in part and reversing in part the final order of the Virginia Corporation Commission in case No.

13182, together with a written opinion. (R. 88-97) 199 Va. 797, 102 S. E. 2d 339.

(16) October 13, 1958, Supreme Court of the United States grants certiorari to review the judgment of the Supreme Court of Appeals of Virginia.

Service was first proceeded against by the Virginia Corporation Commission in June of 1956, and was fined $25.00 in July of that year for engaging in intrastate commerce without a certificate from the Commission. Service did not choose to appeal this ruling. Thereafter, Service was again ordered to appear before the Virginia Commission for engaging in similar illegal operations. At the hearing in the second case (No. 13182) counsel for Service asked to be permitted to file a brief setting forth his position in the controversy and, upon his assurance that it was not his purpose to delay the proceedings (R. 71, 72), the Commission permitted counsel to file a brief 20 days after a transcript of the proceedings was delivered to him. However, on January 14, 1957, one day before the transcript was to be delivered to counsel, Service filed a Petition for Declaratory Order before the I. C. C. Although the State Corporation Commission was served with a copy of the petition, it declined to appear in the appeal proceeding. On March 21, 1957, the Virginia Commission handed down its opinion in case No. 13182, having entered the final judgment order on February 26, 1957. Thereafter, on March 29, 1957, Division I issued its opinion.

Service did not petition the I. C. C. for relief in this matter until after it had been first fined in case No. 13074, and after it had been heard on similar violations involved in this case, No. 13182. Knowing full well that the Virginia Commission would not rule until petitioner's brief had been filed,

Service filed the Petition for Declaratory Order. Under these conditions Service suggests that the Virginia Commission should have sought relief from the I. C. C. It is manifest that this contention is without any basis.

In discussing this aspect of the case petitioner cites *Nelson v. Jessup*, 134 F. Supp. 221, and *Noble* v. *United States*, 319 U. S. 88, as authority in support of its views. In both cases there was no question raised as to whether or not the commerce was interstate. This is also true with reference to *Castle* v. *Hayes Freight Lines*, 348 U. S. 61, which petitioner cites in his brief on page 29. All of these cases involved a state seeking to prevent a certified interstate commerce carrier from engaging in bona fide interstate commerce. The State admitted in each of the above cases that the commerce in question was interstate, but asserted some other regulatory power over it which the courts in each instance denied.

The Commonwealth has demonstrated that this commerce is intrastate and that the petitioner has asserted his federal certificate as a shield to protect his illegal operations. The State is supreme in the control of its own commerce in that it is not only vitally interested in its own affairs, but the State is more able to assure an orderly flow of commerce within its borders. It is, therefore, manifest that the State Corporation Commission is the proper body to hear and determine a controversy such as this.

It is submitted that even if this Court should find this commerce to be interstate, which the respondent earnestly contends that it is not, the State had such a vital interest in such commerce that the State may regulate it. It is unnecessary to restate the facts in this case. It is sufficient we believe to re-emphasize the local nature of this commerce. These operations are of vital interest to the Commonwealth

and, if this type of illegal action is to be permitted, it could easily destroy the orderly flow of commerce within this State. The Supreme Court of the United States has heretofore, on many occasions, recognized the state's vital interest in local matters and has recognized the necessity for permitting the states to exercise jurisdiction over them. In the case of *Panhandle Eastern Pipeline Company* v. *Michigan Public Service Commission*, 341 U. S. 329, this Court permitted Michigan to control the sale of gas by an Interstate Pipeline Company, even though the gas was clearly in interstate commerce. It must, therefore, be concluded that the Corporation Commission is vested with the authority to adjudicate the questions involved in this controversy, even if this Court should adopt petitioner's argument that this commerce is interstate.

CONCLUSION

The respondent prays that this Honorable Court affirm the judgment of the Supreme Court of Appeals of Virginia for the several reasons herein stated.

Respectfully submitted,

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